

IN THE SUPREME COURT

Appeal from the Court of Appeals, Judges Saad, P.J., Bandstra and Smolenski, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Supreme Court No. 121564

Plaintiff-Appellant,

-vs-

GREGORY PETTY,

Defendant-Appellee.

**BRIEF ON APPEAL - DEFENDANT-APPELLEE
ORAL ARGUMENT REQUESTED**

STATE APPELLATE DEFENDER OFFICE

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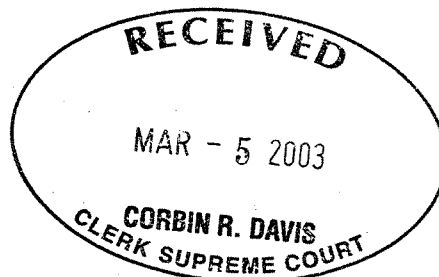


TABLE OF CONTENTS

TABLE OF AUTHORITIES	i
STATEMENT OF QUESTIONS PRESENTED	ii
COUNTER STATEMENT OF MATERIAL FACTS AND PROCEEDINGS.....	1
I. WHERE THE APPLICABLE STATUTE AND CORRESPONDING COURT RULE MANDATORILY AND UNAMBIGUOUSLY REQUIRE THAT THE SENTENCING COURT “SHALL CONSIDER ALL” OF THE ENUMERATED CRITERIA WHEN DETERMINING WHETHER TO IMPOSE A JUVENILE OR ADULT SENTENCE, THE COURT OF APPEALS CORRECTLY REMANDED THIS CASE FOR THE SENTENCING COURT TO RECONSIDER WHETHER TO SENTENCE MR. PETTY AS AN ADULT OR A JUVENILE.	7
II. WHERE ALLOCUTION COULD PLAY A VITAL ROLE IN THE SENTENCING COURT’S DETERMINATION OF WHETHER TO IMPOSE AN ADULT OR JUVENILE SENTENCE THE COURT OF APPEALS DID NOT “CLEARLY ERR” BY ORDERING THAT MR. PETTY BE ALLOWED TO ALLOCUTE.	16
III. THE APPELLATE COURT DID NOT MISAPPLY THE WAIVER DOCTRINE.....	17
RELIEF SOUGHT.....	19

TABLE OF AUTHORITIES

CASES

<u>People v Jackson</u> , 63 Mich App 249; 234 NW2d 471 (1975)	10
<u>People v Julie Bellhorn</u> , Third Judicial Cir. Ct Case No. 99-05147	6
<u>People v Linda Petit</u> , 466 Mich 624; 648 NW2d 193 (2002)	16
<u>People v Morey</u> , 461 Mich 325; 603 NW2d 250 (1999)	7
<u>People v Thenghkam</u> , 240 Mich App 29; 610 NW2d 571 (2000)	12; 13

STATUTES, COURT RULES

MCL 712A.2(a)(1)	1
MCL 712A.2d	7, 10
MCL 712A.18(1)	7, 8, 9
MCR 5.955	7, 8, 9

STATEMENT OF QUESTIONS PRESENTED

- I. WHERE THE APPLICABLE STATUTE AND CORRESPONDING COURT RULE MANDATORILY AND UNAMBIGUOUSLY REQUIRE THAT THE SENTENCING COURT "SHALL CONSIDER ALL" OF THE ENUMERATED CRITERIA WHEN DETERMINING WHETHER TO IMPOSE A JUVENILE OR ADULT SENTENCE, AND WHERE THE TRIAL COURT FAILED TO DO SO, DID THE COURT OF APPEALS CORRECTLY REMAND THIS CASE FOR THE SENTENCING COURT TO RECONSIDER WHETHER TO SENTENCE MR. PETTY AS AN ADULT OR A JUVENILE.

Court of Appeals answers, "Yes".

Defendant-Appellee answers, "Yes".

- II. WHERE ALLOCUTION COULD PLAY A VITAL ROLE IN THE SENTENCING COURT'S DETERMINATION OF WHETHER TO IMPOSE AN ADULT OR JUVENILE SENTENCE DID THE COURT OF APPEALS CORRECTLY ORDER THAT MR. PETTY BE GIVEN THE OPPORTUNITY TO ALLOCUTE?.

Court of Appeals answers, "Yes".

Defendant-Appellee answers, "Yes".

- III. DID THE APPELLATE COURT MISAPPLY THE WAIVER DOCTRINE?

Court of Appeals answers, "No".

Defendant-Appellee answers, "No".

COUNTER STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

On January 20, 1999 a jury found then 16-year-old Gregory Petty, who was being tried as an adult,¹ (Appendix page 141a) guilty of felony murder, armed robbery and felony firearm. The jury acquitted Gregory Petty of one count of second-degree murder.² (21a-24a) Following a sentencing disposition hearing, the court sentenced Gregory Petty, as an adult, to the mandatory term of life imprisonment for the felony murder conviction.³ (114a-117a)

The convictions in this matter arose in connection with the killing of Calvin Lee Whitlow in Highland Park, Michigan on July 19, 1998. Gregory Petty was charged with twelve-year-old McKinley Moore for the offense. Moore was the shooter, and Gregory was charged as an aider and abettor. (191a-192a)

Moore, who shot Whitlow, pled guilty to one reduced count of second-degree murder and was sentenced as a juvenile. (145a). At the plea hearing, Moore admitted shooting Whitlow during a robbery attempt in front of the Highland Park Delicatessen, using a gun he knew was loaded. He said no one gave him the gun; rather, he bought it himself on the street. (165a). Petty was offered the same plea as Moore and refused it.

At Petty's sentencing hearing, the court reviewed the following exhibits: the victim's impact statement, McKinley Moore's statement to Detective Potts taken at the Youth Home, a

¹ Gregory Petty was born on November 18, 1982 and was fifteen (15) years old at the time of the offense (July 19, 1998). Gregory's case was designated for trial in an adult criminal proceeding as authorized by MCL 712A.2(a)(1)(A).

² The prosecution charged two counts of first-degree murder based on alternative theories for the shooting death of Calvin Whitlow. Following the close of the prosecution's case defense counsel moved for a directed verdict of acquittal and the court reduced the first-degree premeditated murder count to second-degree murder.

³ The Judge failed to impose sentence for the armed robbery (the conviction should have been vacated based on double jeopardy principles) and erroneously listed the first-degree premeditated murder charge on the Judgment of Sentence. The Court of Appeals ordered that the Judgment of Sentence be corrected and the prosecution has not disputed that order.

forensic report prepared by Dr. Anthony Keeling of the psychiatric clinic for the Third Judicial Circuit Court, a probation report prepared by the Juvenile Court, a Presentence Investigation Report (PSIR) prepared by the Department of Corrections authored by Diane Woodson, and another statement from McKinley Moore to Darlene McClendon-Gilbert, a worker at the juvenile home. (See, generally 29a-117a).

Diane Woodson, a worker for the Wayne County Adult Probation Department since 1976, interviewed Gregory at the Wayne County Detention Facility, and prepared a presentence investigation report. Woodson concluded that Gregory should be placed on probation, that the imposition of imprisonment should be delayed, and that Gregory should be placed in a supervised residential setting by the Family Independence Agency. Woodson understood that in a designated case the judge had 3 different sentencing options, the second of which was strict adult sentencing, the third involving a blended sentence with delayed imposition of sentence. She had considered all three options. (40a-43a)

Woodson made her recommendation despite her recognition of negative factors in Gregory's past. She felt that an intensive effort at redirection should be made prior to any decision that would inalterably affect the rest of Gregory's life, i.e., lifetime incarceration. (43a, 52s-53a, 55a-57a) If sentenced now as a juvenile, the amount of time under juvenile jurisdiction would not afford Gregory an opportunity for successful rehabilitation, nor would the public be protected. However, if sentenced as an adult he would spend the rest of his life in prison. (43a). Therefore, Woodson thought Gregory should be placed in the juvenile system, with an intensive effort at redirection, then, at age 19, he should be reviewed again to see what should be done. She felt he should do "some adult time", but did not feel that it should begin at age 16. (45a-46a, 47a, 52a-53a, 55a-57a).

Woodson was familiar with the W.J. Maxey Boys Training School, and had heard of Positive Peer Culture. She knew that Maxey housed boys who had been convicted of first-degree murder. (53a). In contrast, 15 or 16 year-olds sentenced as adults go to Michigan Reformatory or Michigan Training Unit in Ionia. The Reformatory is for offenders who need high security; Gregory did not need to go to the Michigan Reformatory. (49a-51a, 55a-56a,). Woodson realized that while Gregory was in juvenile detention he maintained some criminal behavior. Her report indicated that his future for positive adjustment was poor, and that his pattern of antisocial behavior continued through his pre-trial stay at the Wayne County Youth Home. She also understood that the protection of the community is of primary import. (42a-43a). There were a number of unusual incidents after he was committed to the Wayne County Youth Home on July 24, 1998. He was a management problem. However, his behavior eventually improved, and the number of unusual incidents slackened. (44a-45a)

Woodson realized Gregory had been convicted for carrying a concealed weapon, placed at the Nokomis Facility for 90 days, and returned to the community in December 1997. She did not consider Nokomis an intensive effort at redirection. However, after 5 years in juvenile programming with an intensive effort, a hearing would be held when he turned 19. Then, if his sentence was delayed, the court would determine whether to continue jurisdiction until age 21. (57a-59a).

Witness Anthony Keeling worked for the Forensic Center for the former Recorder's Court for 37 years. His report recommended a delayed sentence. He recommended that Gregory be sentenced as an adult, but, if possible, attempts should be made under the juvenile system if the structure of that system would change. Keeling believed that the juvenile system as it is presently structured would not be an option for Gregory. This was based on Keeling's

assessment of Gregory's psychosocial development, his family interactions, his schooling and the nature of a variety of problems he was struggling with. (60a-63a)

Keeling said Gregory was disinterested in the examination during their interview. At times he was overly aggressive, but his behavior was aggressive because of the "underlying psychosexual problems he may possibly have or be struggling with". (61a-62a). Keeling referred to Gregory's underlying psychosexual problems many times as the root cause of his difficulties and problems with impulse control. (62a-82a). Gregory had very little early intervention, and his limited skills and poor impulse control were directly related to his conflicts in interpersonal relationships "particularly with women or female caretakers". (64a) He recommended a delayed sentence of incarceration. The juvenile system should give Gregory more time, but he did not need "life". (65a).

Although the W. J. Maxey Training School is structured, Keeling thought Gregory could not handle his underlying sexual conflicts. (75a). Keeling recommended that given Gregory's youthfulness, further attempts should be made at treatment through detention as a juvenile through the age of 21. Gregory could stay within the juvenile system, receive treatment, and be reevaluated at age 19 and 21. (79a-82a).

Sylvia Haikio, who knew that Gregory had been influenced by worker Julie Bellhorn, one of his female caretakers at the Juvenile Detention Facility, did not reveal this to the Court. Haikio did a PSI on Gregory, flatly recommending an adult sentence. (83a-88a). Haikio, who did not have a master's degree, discussed Gregory's previous juvenile adjudications, many or most of which were dismissed without prejudice. She recommended the adult sentence because it would be in the best interests of the public. The juvenile system did not have enough time to address Gregory's needs. (89a-91a). However, Haikio knew that Gregory successfully

completed the Nokomis Positive Peer Culture treatment program. (89a-90a, 93a). Haikio still thought that Gregory had received the “maximum amount” of treatment in the juvenile system, although he had spent only 90 days at Nokomis. (95a). She felt that due to the serious nature of Greg’s offense, and his “problematic behavior” in their detention facility, the juvenile system did not have enough time to help him. (96a-98a, 100a).

Haikio knew that Gregory was an honor roll student at the juvenile detention facility, and was doing well in the structured environment there. (98a-99a).

In sentencing Gregory as an adult, the Court indicated there were a number of contacts with the juvenile system, that all the reports indicated that he needed more time than what the juvenile system would allow, and therefore, if juvenile disposition would not be sufficient, then the Court had no alternative but to give Gregory a mandatory life sentence without parole. (114a-117a).

On February 3, 2000, appellate counsel filed a motion to vacate Gregory’s conviction or for an evidentiary hearing in the trial court under MCR 7.208. (119a-151a). The motion detailed Gregory’s revelations after trial that, during his pre-trial stay at the Wayne County Juvenile Detention Facility, he had been sexually exploited by youth worker Julie Bellhorn. Bellhorn also improperly interfered in Gregory’s attorney-client relationship by giving him legal advice in conjunction with her sexual exploitation of Gregory. Bellhorn, who pled nolo contendere after she was tried by the Wayne County Prosecutor’s for sexual abuse of at least one other boy from

the facility⁴, improperly influenced Gregory. The motion was dismissed by stipulation of the parties on December 13, 2000. (158a).

Gregory Petty appealed of right to the Court of Appeals and in an unpublished per curiam opinion, that Court affirmed Mr. Petty's convictions, but remanded for resentencing. (191a-200a)

This brief is filed in response to this Court's grant of leave to the prosecution and the prosecution's brief to this Court.

⁴ See People v Julie Bellhorn, Third Judicial Cir. Ct Case No. 99-05147. Bellhorn's trial in April of 2000 for sexually exploiting LaQuan Nathaniel James ended in a hung jury. She later pled nolo contendere prior to retrial. Her activities exploiting youth at the detention facility spawned an investigation of activities of officials at that facility. Gregory told worker Sylvia Haikio at his presentence interview, when she inquired why he did not take a plea offer with a juvenile sentence as McKinley Moore had done, that he did not plead to a reduced charge but went to trial because Ms. Bellhorn advised him to do so.

I. WHERE THE APPLICABLE STATUTE AND CORRESPONDING COURT RULE MANDATORILY AND UNAMBIGUOUSLY REQUIRE THAT THE SENTENCING COURT “SHALL CONSIDER ALL” OF THE ENUMERATED CRITERIA WHEN DETERMINING WHETHER TO IMPOSE A JUVENILE OR ADULT SENTENCE, THE COURT OF APPEALS CORRECTLY REMANDED THIS CASE FOR THE SENTENCING COURT TO RECONSIDER WHETHER TO SENTENCE MR. PETTY AS AN ADULT OR A JUVENILE.

Preservation of error and standard of review. Defense counsel argued for a juvenile sentence in the trial court and argued in the Court of Appeals that the sentencing court failed to make the requisite findings when imposing sentence.

Contrary to the prosecutor’s claim, this sentencing error is not reviewed under a “plain error” standard of appellate review. Rather, it is well settled in Michigan law that statutory interpretation is a question of law, which an appellate court reviews *de novo* on appeal. The primary rule of statutory construction is to ascertain and give effect to the intent of the Legislature. In doing so, the reviewing court examines the specific language of the statute. If the language is unambiguous, no further judicial construction is required or permitted and the statute must be enforced as written. . *People v Morey*, 461 Mich 325, 329-330; 603 NW2d 250 (1999).

Gregory Petty was designated for an adult trial in the family court pursuant to MCL 712A.2d. Consequently, his juvenile sentencing procedure was governed by MCL 712A.18(1)(n). That provision states in pertinent part:

“In determining whether to enter an order of disposition⁵ or impose a sentence⁶ under this subdivision, **the court shall consider all of the**

⁵ Referring to a juvenile disposition.

⁶ Referring to an adult sentence.

following factors, giving greater weight to the seriousness of the offense and the juvenile's prior record:

(i) the seriousness of the offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim.

(ii) the juvenile's culpability in committing the offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines.

(iii) the juvenile's prior record of delinquency, including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior.

(iv) the juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming.

(v) the adequacy of punishment or programming available in the juvenile justice system.

(vi) the dispositional options available for the juvenile. MCL 712A.18(1)(n).

Michigan Court Rule 5.955 contains the following similar, but not identical, language:

"In deciding whether to enter an order of disposition, or impose or delay imposition of sentence, **the court shall consider all of the following factors**, giving greater weight to the seriousness of the offense and the juvenile's prior record:

(1) the seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the effect on any victim;

(2) the culpability of the juvenile in committing the alleged offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines;

- (3) the juvenile's prior record of delinquency, including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior;
- (4) the juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming;
- (5) the adequacy of punishment or programming available in the juvenile justice system;
- (6) the dispositional options available for the juvenile."

Based on the enumerated factors, the sentencing judge must determine that the "best interests of the public" would be served by imposing an adult sentence, before he may impose such a punishment. MCL 712A.18(1)(n), MCR 5.955(B). The prosecutor bears the burden of proving by a preponderance of the evidence that, on the basis of the enumerated criteria, it would be in the best interest of the public to sentence the juvenile as an adult. MCR 5.955(B).

It can be presumed that the Legislature intended the plain meaning of the words it used in drafting MCL 712A.18(1)(n). That statute unambiguously requires the sentencing court to **"consider"** all of the enumerated criteria when determining whether to impose an adult sentence. The word "consider" is defined in Black's Law Dictionary in the following manner:

"To fix the mind on, with a view to careful examination; to examine; to inspect. To deliberate about and ponder over. To entertain or give heed to." BLACK'S LAW DICTIONARY 277 (5th Edition, 1979).

The Random House Dictionary defines the word "consider" as follows:

"1. To think about carefully esp. in order to make a decision; contemplate; reflect on. . . . 10. To think deliberately or carefully; 11. To view carefully or thoughtfully. To examine." RANDOM HOUSE DICTIONARY 313 (1971).

By using the word “consider”, it is clear that the Legislature intended a sentencing judge to thoroughly and thoughtfully deliberate and carefully examine the circumstances in a given case when deciding whether to impose an adult or juvenile sentence. In order for reviewing courts to determine whether a sentencing judge, in fact, “considered” each of the statutory criteria, it is essential that the judge specifically cite the circumstances that support his finding on each factor. It is also essential that his findings establish that he completely examined each of the requisite criteria. If the judge fails to articulate the reasons for his findings, there is no record upon which an appellate court can determine whether the judge abused his discretion in determining that a child should be sentenced either as an adult or as a juvenile.

A reviewing court cannot be sure that the sentencing judge gave proper consideration to all of the requisite factors if the judge never states specifically what he considered in meting out the sentence and does not articulate the results of that consideration. See, *People v Jackson*, 63 Mich App 249; 234 NW2d 471 (1975).

The need for a sentencing judge to recite clear and complete reasons for his decision becomes even more critical in a designation case, such as this one. The designation statute authorizes the imposition of an adult sentence without regard to a child’s age. MCL 712A.2d. Therefore, a child of any age can be tried and sentenced as an adult pursuant to its provisions. Before a sentencing judge sends a 10-year-old, 8-year-old, or a 6-year-old to prison, he should be required to make thorough and specific findings on the record in support of his decision. Yet, if this Court rules that no factual findings and reasons for an adult sentencing are required, it will sanction the adult incarceration of very young children based on a sloppy and incomplete record.

The judge who sentenced Gregory Petty did not engage in the requisite deliberate and careful examination when determining whether to impose an adult or juvenile sentence. Notably

missing from the Court's sentencing decision is any application of the relevant factors to the facts of Gregory's case and his background. The court stated:

THE COURT: All right. Well, the Court has listened carefully to all of the testimony that's been offered, the statements that have been provided, the reports that have been offered. I've had a chance while counsel was speaking in closing to look over Ms. Gilbert's report or statement.

The thought of sentencing anyone to life in prison without chance of parole takes your breath away. But after you catch your breath it's very clear that we have guidelines. They're called laws. And we're required to follow the law. To that extent, this Court's responsibility, this Court's duty is to interpret not only the conviction of first degree murder; not only the conviction for armed robbery; not only the conviction for felony firearm, but to look as how a sentence as an adult versus disposition as a juvenile will impact the community.

This Court has had a chance to hear quite eloquently from the family of the victim. They have been consistant (sic) in their appearances before the Court throughout this lengthy process. I don't believe there's any question, in fact it's not controverted, the jury found Mr. Petty guilty of first degree murder. There is no more serious crime. The jury also found that even though he was not the actual person who fired the weapon that resulted in the death of Mr. Whitlow, that he was responsible for that.

The record of Mr. Petty, the juvenile record, certainly reflects a number of contacts. I was a little surprised at some of the testimony offered this morning.

I talked about the law a few moments ago. The law dictates whether people are innocent or guilty upon the presentation of evidence and a ruling either by a Court or by a judge or by a jury. To read a report that says there was a dismissal or there was – there's insufficient evidence does not begin to tell the whole story. What I have though based on information that's in the file, based on these reports is there has been consistant (sic) contact with this Court that has resulted in not one, but now two convictions. One for carrying a concealed weapon and now this one, which includes – actually three convictions for various felonies including murder one.

Mr. Bradfield argued that there is sufficient juvenile programming available to assist Mr. Petty. I don't think really that's controverted. The question is did the witnesses come forward with ambiguous recommendations about—Judge I think that he ought to be in a juvenile system, but I think he probably needs to be their (sic) longer than the law allows. That is the crux isn't it? It's what the law will allow. And if you're saying that he needs to be in there longer

than what the law will allow for a juvenile then you are saying to this Court that the only option we have available is the adult sentence. He's not been successful in the programming requirements relative to this matter.

At the hearing involving Mr. Moore, the court talked about penalizing the mother if the law would allow. Now perhaps that was a little unfair. The mother, the father, family, school, court, you name it, I think that there's plenty of blame to go around. But the reality is that when you get finished assessing blame it still gets us back to what law demands. If the juvenile disposition will not be sufficient then from where I sit there is no alternative. As such I will sentence Gregory Petty as an adult. The law requires a mandatory life sentence without parole. That's all." (ST, 86-89)(emphasis added).

As acknowledged by the prosecution and the Court of Appeals, the appellate decisions to date have required factual findings on each of the enumerated criteria. The most scholarly discussion of this issue is set forth in *People v Thenghkam*, 240 Mich App 29; 610 NW2d 571 (2000). In that case, the 16-year-old juvenile defendant, who was convicted as an adult of second-degree murder, was twice sentenced as a juvenile following a dispositional hearing. The Court of Appeals remanded the case for a second resentencing, this time before a different judge, where it found that on both previous sentencing proceedings, the trial court failed to properly discuss and evaluate each of the criteria.

In *Thenghkam*, the Court fully discussed the bifurcated standard of review and stated that:

"Furthermore, as with all judicial decisions that do not rest solely on the law, a trial court deciding whether to sentence a defendant as an adult or a juvenile must point to the requisite facts to justify its decision. Consequently, and aside from the question of clear error, if the trial court fails to make findings of fact, it cannot fully exercise its discretion by giving proper weight to the various factors it must consider to make its decision under the sentencing statute.

In sum, it is the trial court's execution of weighing and balancing its findings to support the decision to sentence a defendant as an adult or a juvenile that concerns the appellate court under this abuse of discretion analysis."

Id. at 48-49 (citations omitted)

In the present case, we have far less fact-finding than the *Thenghkam* Court had to review. As restated above, the Judge's decision was no more than a few paragraphs of comments, made without any reflective thought following the testimony of the witnesses and the argument of counsel. The Judge never even gave Gregory Petty an opportunity to say anything in his defense. As discussed below, the Judge's conclusory comments in no way amounted to the deliberative thought process envisioned and set forth in the statute and court rule. To condone this type of decision-making process does nothing to promote justice and fairness in the sentencing process.

When addressing the first factor, the sentencing court did mention that there "is no more serious offense" than first-degree murder. However, he did not articulate how the seriousness of the particular offense or how Gregory Petty's role in the offense affected the community's protection.

With respect to the second factor, Judge Burton recognized that Gregory was not the actual shooter, but indicated that the jury nonetheless found Gregory responsible for the decedent's death. He did not elaborate on other mitigating circumstances of the offense, such as the testimony, which suggested that Gregory was surprised that McKinley Moore shot the decedent. Nor did the judge address any aggravating factors, which suggested that an adult sentence was appropriate despite the fact that Gregory was not the shooter. In actuality, the judge's finding on this criterion amounted to nothing more than an abdication of his sentencing discretion to the jury. Furthermore, the nature of the offense was already addressed in the first factor.

While the judge referred to Gregory's criminal record, he did not specifically address whether Gregory's record of detention, or his school record suggested that an adult sentence was more appropriate or in the best interests of the public. (Criteria 3). While Judge Burton did state that Gregory Petty had not been successful in the "programming requirements relative to this matter", he did not specifically address the nature of Gregory's programming history. Nor did he provide reasons for his finding that he did not believe it was successful. (Criteria 4). Judge Burton did not articulate what specific programming options were available to Gregory Petty in the juvenile justice system. He simply indicated that Gregory needed to be in the juvenile system longer than the law allowed, and he gave insufficient reasons for this conclusion. Much of the judge's ruling is rambling, disjointed, and incoherent. As he does not always specifically state which criterion he is addressing during his ruling, the reader is often forced to speculate as to which statement addresses which criterion.

This type of ruling is not the type of careful examination mandated by the statute for juvenile sentencing in designated proceedings. Furthermore, he never specifically stated why he believed a juvenile disposition was improper. As it was the prosecutor's burden to prove that an adult sentence was in the public's best interests the "ambiguous recommendations" cited by the judge mandated a juvenile sentence. The ambiguity should have been resolved in favor of a juvenile sentence where the only alternative was mandatory life imprisonment. It is not clear that the judge, in fact, "considered" each and every enumerated factor, as is required by the unambiguous language of the applicable statute.

The Judge's failure to give thoughtful and deliberate consideration to each enumerated factor and to set forth a record for the appellate courts to review mandates that his decision was an abuse of discretion. This Court should remand this case to the trial court for a resentencing

hearing where the Judge engages in a thoughtful and deliberate analysis of each of the sentencing factors and makes a determination, based on the evidence, of the appropriate sentencing option for Mr. Petty. It would be an insufficient remedy for this Court to follow the prosecution's suggestion and remand for an articulation of the reasons supporting the Judge's sentence. The Judge articulated his reasons and that articulation evidences an abuse of discretion. The only appropriate remedy is that which the appellate courts have mandated in previous cases, remand for resentencing. Thenghkam, supra.

**II. WHERE ALLOCUTION COULD PLAY A VITAL
ROLE IN THE SENTENCING COURT'S
DETERMINATION OF WHETHER TO IMPOSE AN
ADULT OR JUVENILE SENTENCE THE COURT
OF APPEALS DID NOT "CLEARLY ERR" BY
ORDERING THAT MR. PETTY BE ALLOWED TO
ALLOCUTE.**

Standard of Review and preservation. Appellant agrees that he did not object to the judge's failure to allow him to allocute. He agrees with the prosecutor's standard of review and asserts that the court's failure to allow him to allocute constitutes plain error affecting his substantial rights.

The prosecutor argues that the court's failure to allow Gregory Petty to allocute is harmless because the sentence is mandated by statute. However, the Court of Appeals remanded for allocution before the judge's decision on whether to impose an adult or juvenile sentence as well as before imposition of the actual sentence.

Gregory Petty's allocution before the determination as the type of sentence to be imposed could have a significant impact on the judge's decision. That decision by the court will determine whether Gregory will possibly be released at age 21, or incarcerated for eternity. Nobody, especially not a child, should be deprived of the opportunity to address the sentencing court before the court makes a decision that so significantly impacts the child's future.

The prosecutor's reliance on *People v Linda Petit*, 466 Mich 624; 648 NW2d 193 (2002), is completely misplaced. In *Petit*, this Court held that the Court's question "anything further", to nobody in particular, gave the defendant the opportunity to allocate, an opportunity that she passed by. Thus, there was no error in that case. *Id.* at 628-629. Gregory Petty was not given any opportunity to say anything on his own behalf. Thus, his case is easily distinguishable from *Petit* and he should be afforded the opportunity to allocate on his behalf at the resentencing.

III. THE APPELLATE COURT DID NOT MISAPPLY THE WAIVER DOCTRINE.


Because this Court did not include this issue in its order granting leave, the portion of the prosecution's brief addressing this issue should be stricken. However, should this Court decide to pursue this issue, appellate counsel would like an opportunity to respond in writing to the prosecution's argument.

RELIEF SOUGHT

Defendant-Appellee Gregory Petty asks this Honorable Court to affirm the Court of Appeals Opinion and remand this case to the trial court for resentencing.

Respectfully submitted,

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